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ABSTRACT

Although colleges and universities generally regard the First Amendment as sacred, they often find themselves at the center of controversies concerning the right to say, print, write, or research with freedom. The complex relationships between a college or university and its student media have often contributed to conflicts over First Amendment issues. This paper examines the case of State of Ohio, ex. rel "The Miami Student" v. Miami University (which began in 1996), when university administrators found themselves being sued for restricting the campus newspaper's access to student disciplinary records and later being sued by the United States government for providing the media with these records. The paper looks at the legal arguments presented in this trail of litigation as a basis for examining the university's obligations to balance the First Amendment rights of the student media and its community with other often conflicting rights, such as the privacy rights of individuals. It examines the central issue of openness for the public good versus the legal rights of individual privacy and whether the First Amendment rights of the student media should prevail on the issue of access to internal disciplinary records of students. (Contains 6 notes and 14 references.) (NKA)

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Miami University

I'VE LOOKED AT THE NEWS FROM BOTH SIDES NOW: THE STUDENT PRESS FROM THE PERSPECTIVE OF AN ADVOCATE AND AN ADVERSARY

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THE STUDENT PRESS FROM THE PERSPECTIVE

OF AN ADVOCATE AND ADVERSARY

Colleges and universities generally regard the First Amendment as sacred words, with the freedom to speak and the freedom to research and write as one pleases considered a core value for higher education institutions. How can one find truth, after all, without full freedom of inquiry and unshackled debate? Yet oddly, colleges and universities often find themselves at the center of controversies concerning the right to say, print, write, or research with freedom. While universities and colleges may have a sincere interest in protecting and championing the First Amendment rights of its community members, sometimes they must confront the possibility that other rights or other interests can conflict with freedom of speech or press. Thus, heated controversies and lawsuits over First Amendment issues have erupted on campuses in recent years. Speech codes, tenure review cases and controversies over the research or pedagogical interests of faculty have thrust institutions of higher learning into the middle of some of the more intriguing debates about First Amendment issues.

The complex relationships between a college or university and its student media also have contributed to the conflicts over First Amendment issues. A university must staunchly defend the First

Amendment rights of the student media and foster the development of talented student reporters and editors, while at the same time recognize the media's interests can directly conflict with other interests. Sometimes, the university and the student media can be both proponents and opponents within the same issue.

In fact, this was the case in State of Ohio, ex. rel *The Miami Student* v. Miami University, when university administrators found themselves being sued for restricting the campus newspaper's access to student disciplinary records and later being sued by the United States government for providing the media with those records. In this unusual case the balancing act was between the public's right to know—and the media's right to print information it felt its audience should know—and the right of privacy guaranteed to students by a federal law. The institution, in this case Miami University, was caught "between a rock and a whirlpool" as one observer put it (Pavela, October 1997). As this litigation has wound its way through the courts, arguments have emerged about such topics as the primacy of individual privacy versus public safety, the weight of federal versus state law, and the importance of protecting acquaintance sexual assault victims versus creating greater awareness of the incidence of such assaults.

Litigation began after Miami University officials withheld from its student newspaper, *The Miami Student*, certain types of information contained in university disciplinary files. University officials feared

providing fully what the newspaper requested would cause it to violate the Family Educational Rights and Privacy Act of 1974 (FERPA). The student newspaper sued, and the Ohio Supreme Court found that the university had violated the state's public records law by not fulfilling the request of *The Miami Student*. However, the same university administrators soon found themselves in federal district court defending themselves against the U.S. Department of Education's assertion that turning over these records under state court order violates FERPA (The United States of America v. The Miami University, The Ohio State University, and The Chronicle of Higher Education). The university was found by the federal district court judge to have broken federal law, and an appeal has been filed, not by a university, but by a newspaper wanting access to the disciplinary files.

This paper looks at the legal arguments presented in this trail of litigation as a basis for examining the university's obligations to balance the First Amendment rights of the student media and its community with other, often conflicting rights, such as the privacy rights of individuals. It examines at the central issue of the openness for the public good versus the legal rights of individual privacy, and whether the First Amendment rights of the student media should prevail on the issue of access to internal disciplinary records of students.

Litigation and Legislation

Before considering the details of the Miami University case, it is important to summarize the prior litigation and legislation on the core issues in this case: Whether disciplinary files are education records, law enforcement records, or public safety records, whether FERPA applied to non-academic records, and the public's right to know fully what these files contained.

The central piece of federal legislation in this case, the Family Educational Rights and Privacy Act, was enacted in 1974. Also commonly known as "the Buckley Amendment" after its sponsor, Senator James Buckley, FERPA allows the federal government to withhold federal funds from an institution which has "a policy or practice of permitting the release of education records" of students without permission of the individuals. There was little debate over the measure and no hearings, but the apparent intent of the legislation was to control unauthorized or careless distribution of student records and to assure students' access to their own records. The law defines "education records" broadly, as records "that contain information directly related to a student" and that are "maintained by an educational agency or institution." FERPA also restricts release of "personally identifiable information" about the student, other than directory information. "Personally identifiable information" would include any information "that would make the student's identity easily traceable."

While in enacting FERPA Congress did not mention disciplinary records, in 1990 that body did amend FERPA to comply with the Campus Awareness and Campus Security Act of 1990, which requires campuses to compile and publish statistical data on campus crime. Congress amended FERPA to allow universities to provide victims of "any crime of violence...or nonforcible sex offense, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator."

The next year, a federal court ruled in Bauer v. Kincaid, a case involving a request by a student newspaper for campus law enforcement records, that "Congress did not intend to treat criminal investigation and incident reports as educational records." Indeed, in 1992, a year later, Congress explicitly excluded law enforcement records from protection by FERPA. Left unresolved, however, was whether "law enforcement" also meant the internal disciplinary proceedings conducted by colleges and universities. The U.S. Department of Education did not release its final determination on what comprised law enforcement records until three years after Congress's action, in the 1995 final FERPA regulations.

In the interim, a case emerged in Georgia (Red & Black Publishing v. Board of Regents) following a request by the student newspaper at the University of Georgia for information about a campus organization court's handling of a hazing allegation against a fraternity. In this case, the Georgia Supreme Court declared that education records are those

"relating to individual student performance, financial aid, or scholastic probation." The Georgia court maintained that records of violations of university rules and regulations were more like law enforcement records than academic information. The U.S. Department of Education did not intervene in the Georgia rulings, nor has it taken action against any Georgia institution that might have opened its disciplinary process as a result of their state court's opinion. It is worth noting, however, that this case involved an organizational court, which handles judicial actions against whole student organizations, not individual students.

The Georgia court's viewpoint was not unanimous. For example, in 1994 a Louisiana court denied a request from a student and a student reporter who asked for copies of a disciplinary hearing at Louisiana State University, citing FERPA (Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University in Shreveport).

When the Department of Education issued its 1995 FERPA regulations on the exclusion of law enforcement records from FERPA protection, the Department indicated it viewed disciplinary records as educational records until Congress decided otherwise. Secretary of Education Richard Riley wrote that he "remains legally constrained to conclude that records of an institution's disciplinary action or proceedings are 'educational records' under FERPA, not law enforcement records, and that excluding these records from the definition of 'educational records' can be accomplished only through a statutory

amendment of FERPA by Congress." The Department of Education's opinion stems in part from its view that Congress clearly intended disciplinary records to be private, because the lawmakers had modified FERPA in 1990 to allow the release of specific information on disciplinary proceedings to victims of certain "crimes of violence." [1]

History of the Miami University litigation

In the spring of 1996, editors of *The Miami Student* requested that Miami University provide all records "reflecting the disposition of cases of student misconduct by the University Disciplinary Board" for the past three years. The University Disciplinary Board is a faculty-student panel that hears many of the cases involving the more severe violations of the university's Code of Student Conduct. The university's disciplinary system handles incidents that may not constitute a criminal violation, such as academic dishonesty or violating the residence hall hours for visitation, and as well the university's judicial affairs office reviews all arrests and citations issued to students by Miami University police and City of Oxford police to determine if there have been violations of the university's conduct code in those instances. *The Miami Student* editors intended to build a database of disciplinary records to examine the campus judiciary system and report broadly on criminal and disciplinary incidents involving students.

The editors indicated that the university did not have to provide names, student identification numbers, "or any other information that conveys the identity of any accused or convicted party," but went on to add that if this information could not be deleted, "the record[s] should be provided in their original form."

The university turned over the requested documents, but only after redacting information to avoid what it saw as possible conflicts with FERPA, saying the redacted sections would provide "personally identifiable information."

The *Student* editors objected to the university's redaction of such information as age and gender of individuals facing discipline and the date, time, and location of incidents. *The Miami Student* filed suit in the Ohio Supreme Court, charging that the university's withholding of the redacted information constituted a violation of Ohio's public records law. This fairly broad state statute allows open access to public records in Ohio with few exceptions, and generally the law has been interpreted by the state courts generously to provide more openness of records. One exception specified in the law, however, restricts opening of those records "the release of which is prohibited by state or federal law." At issue, then, was whether disciplinary records were "education records" under FERPA, prohibited from release without consent under federal law and thus restricted from access under the Ohio public records statute.

In January 1997 the Ohio Supreme Court ruled that while the university "was warranted in deleting information that [the student editors] never sought, some of the information which it deleted was improperly withheld." The Court said the university could delete the student's name, social security number, student identification number, and "the exact date and time of the alleged incident...since this constitutes other information that may lead to the identity of the student. The university must disclose, however, the general location of the incident, the age and sex of the student (which does not identify the student), the nature of the offense, and the type of disciplinary penalty imposed." This part of the ruling seemed to imply that the Ohio Supreme Court judges viewed portions of the information in the disciplinary records as "personally identifiable" information that could violate a student's right to privacy under FERPA. The judges appeared to be attempting to give greater definition to what was "personally identifiable," while still holding that these were FERPA-protected records. That part of the Ohio Supreme Court decision has not been challenged in subsequent litigation.

However, the Court also ruled outright that "university disciplinary records are not 'education records' as defined in FERPA." The judges drew heavily upon the decision by the Georgia Supreme Court in Red & Black v. The Board of Regents that the records of a University of Georgia student judiciary court that disciplined fraternities were not "education

records" under FERPA, since they were not connected strictly to such matters as grades or financial aid. The Ohio Supreme Court's outright declaration that disciplinary records were not subject to FERPA seemed to conflict with other parts of its ruling, and drew attention from onlookers of the case, in particular a national newspaper, *The Chronicle of Higher Education*. After Miami University was denied a writ of certiorari by the United States Supreme Court in appealing the Ohio court's ruling, *The Chronicle* proceeded with a broad public records request for extensive copies of disciplinary files at Miami University and Ohio State University, including the names of students involved. The newspaper indicated it wanted to "provide a window into how the internal disciplinary system works." However, the university also received a letter from LeRoy S. Rooker, Director of the Family Policy Compliance Office of the United States Department of Education, who argued that the Ohio court's ruling that disciplinary records are not education records "is wrong as a matter of law." Rooker wrote that the only types of student records "excluded from the definition of education records are records specifically listed by the statute such as law enforcement records. Thus, records of campus disciplinary proceedings taken against students accused of misconduct, including those of a criminal and non-academic nature, are education records under FERPA because they are directly related to one or more students and are maintained by an educational agency or institution."

When the universities began to turn over some of its disciplinary records to *The Chronicle,* the Department of Education sued Miami and Ohio State universities in U.S. District Court to stop any further release. *The Chronicle of Higher Education* later joined the suit as intervenor-defendant.

The U.S. District Court in March 2000 found that student disciplinary files are education records under FERPA and thus that the defendants have violated that law by turning over some of its records with names intact. "It is abundantly clear that disciplinary records...satisfy both prongs of the statutory definition of education records," in that they contain information about students and are maintained by colleges and universities. The Court deferred to the Department of Education's responsibility to provide a "reasonable interpretation" of any provision of FERPA that is ambiguous.

The Chronicle has appealed that decision to the Sixth Circuit Court of Appeals. Neither university is a direct party in the appeal.

First Amendment issues

The Miami University cases at both the federal and state level focused heavily on the legal issues of whether Congress intended FERPA to be applied to disciplinary records and if that was unclear, whether the U.S. Department of Education had the responsibility to determine if the records merited FERPA protection. However, in both cases the

newspaper involved injected arguments that FERPA violates the First Amendment by restricting access to student disciplinary records pertaining to criminal activity. The newspapers relied heavily on such cases as Richmond Newspapers v. Virginia that recognize a First Amendment right of access to criminal trials, proceedings and records.

The state court in the *Miami Student* v. Miami University decision was mute on the direct First Amendment issues put forth by the plaintiffs. Instead, it concentrated on the relevance of the Ohio Public Records Act. However, the District Court in United States v. Miami University refused to extend the First Amendment right of public access to criminal trials and related proceedings to university disciplinary actions. Disciplinary proceedings "are not criminal in nature as they only regulate the relationship between the student and the university, and have no bearing on a student's legal rights or obligations under state or federal criminal laws," the Court wrote. "Even if the Court were to apply principles from the Richmond line of cases, it would not affect the Court's conclusion...the right of access is not absolute." The first test of First Amendment access was whether the information sought has been traditionally available to the media and the public, and disciplinary information has not been generally available, the Court noted. The second test for access, the Court noted, was whether opening up the records would create "a significant positive role" in the disciplinary process. The Court said no compelling evidence was presented that

opening disciplinary records or proceedings might better serve the students or the university. The Court speculated on some reasons opening up the process could be damaging: "...requiring more openness and increased formality would make disciplinary proceedings more costly and could hinder their effectiveness as a mechanism for safeguarding the educational atmosphere of colleges and universities...Additionally, victims and students in general may be less inclined to report violations of university regulations or to pursue the disciplinary process if they know that any disciplinary proceedings that ensue will be open to the public."

However, the Court acknowledged in a footnote that neither *The Chronicle* nor the universities put forth any arguments for opening in defending the federal suit and creating a "significant positive role" for an open process. It wrote, "one might be able to raise arguments that more openness would improve the university disciplinary process."

Thus, despite the lengthy litigation to this point, a fundamental question remains: What would we know that we do not know now and would our society or community be better (or worse) off as a result? To address this question, it is important to examine further the nature of the disciplinary records and some of the arguments that have been made to justify their public release.

The disciplinary process involves whether the student charged violated his or her agreement with the university to follow a code of

conduct, and if so, what the punishment should be. It is an internal process, based on a set of regulations put forth by the university or college, not on criminal laws. As such, the records at issue in these cases are not "crime records," as often erroneously labeled.[ii] They are records of possible violations of a campus's set of rules, policies, or regulations.

Like in most judiciary systems, the largest number of violations are minor ones, involving such offenses as allowing a visitor to remain in your dorm room after (curfew) hours, making too much noise, or having conflicts with roommates or dorm neighbors. Many others are drawn from academic or student residence regulations and also would never qualify as "crimes." The citations are often handled out by staff, including student staff, and the cases may be heard by student courts. Do acts of student foolishness or conflicts with community expectations that do not involve any threat of public safety deserve possible public scrutiny by reporters (or for that matter, such people as future employers, future opponents for political office, or your parents)? Should students at public colleges or universities, covered by public records laws, suffer possible public intrusion into their minor "youthful indiscretions," while their counterparts at private institutions afforded extra privacy?[iii]

In making its request for two years of disciplinary records from Miami and Ohio State universities, *The Chronicle of Higher Education*

indicated it needed full access in order to examine the equity of the processes used and fairness of judgments made and penalties assessed. This appeals to a fundamental First Amendment argument, that a wary media needs the freedom to keep a clear eye on government. If you acknowledge the role of student media as part of the Fourth or Fifth Estate, then should it have the ability to monitor all levels of the judicial branch of its university's government?

Blocking information about university disciplinary to exclude some that might not merit public review also creates the risk of blocking access to information vital or useful to the public good, and raises legitimate questions about who decides what information is worthy of protection or release. There are offenses involved in campus student conduct cases that do involve crimes and the possible threat to public safety. Many disciplinary cases often start with an arrest by police. Universities and colleges take parallel, but separate, judicial actions against students charged in a crime, even those charged by non-campus police in many instances.[iv]

In these cases, there actually is little public safety information not available to the media and the public, since the accessibility of arrest and court records is well defined. What is missing from public view in many cases, however, is the verification of university action against a student arrested for a serious misdeed. Rightly or wrongly, what a university does to punish a star football player accused of a serious crime often

gathers more public scrutiny than whether a jury will find the athlete guilty. However, announcement of any disciplinary action taken by the university against the athlete might be restricted by FERPA, depending by the nature of the offense.

Until FERPA was amended in 1998, any public announcement of university action might have been violating federal law. In 1998 Congress broadened the statute to allow for the public release of the name, violation, and sanction for someone accused of what may constitute a "crime of violence" or "nonforcible sex offense" as defined by federal law.[v] This change to FERPA seemed intended by Congress to address the call for greater scrutiny of serious campus incidents without opening up all disciplinary records to full scrutiny.

The Congressional changes in FERPA do not resolve all issues or provide enough access, in the view of some. Vagueness of the legislation is one criticism (Sidbury). Institutions are having difficulty defining what may or may not qualify as a "crime of violence" under this statute. Another potential shortcoming can be seen in the hypothetical case of the start football player accused of a crime. The institution may not inform the public about the disciplinary process as it is proceeds through the university. In fact, it can say virtually nothing about the individual case until the "final results" of the disciplinary process, which may take weeks or months depending upon hearings and appeals, and then only if the institution determines the accused committed the act. The

information available to the public then is restricted to name of the accused, the violation committed, and any discipline by the institution. Other students involved in the case, such as witnesses or victims, would have to waive their FERPA rights. The amendment would not cover such non-violent crimes as selling drugs or illegally possessing a firearm (Sidbury).

There is a third category of disciplinary cases, those that involve internal judicial actions handled by campuses that involve possible criminal violations where no police charges are filed. These cases often reside at the center of public controversies about access to disciplinary records, even though their number is relatively small. Often they are the most difficult cases to judge in determining whether public access to more information better serves the students involved, or the student public as a whole, for very reason why criminal prosecution is not sought. There may be insufficient evidence to prove guilt beyond all reasonable doubt in a criminal system, but sufficient evidence to consider action in disciplinary systems that generally require a much lower standard to prove violation of internal rules or policies. The incident may involve a victim of a crime who is unwilling to go through a public trial but allows and desires a private hearing.

Of special concern to college administrators are the victims of sexual assault, particularly acquaintance sexual assault, who might have to endure emotional public trials in cases that are difficult to prosecute.

In their amicus memorandum filed in the United States v. Miami University case, the Association for Student Judicial Affairs, the National Association of Student Personnel Administrators, and the American College Personnel Association argued that opening all discipline records would deter victims from coming forward, and "no response can be forthcoming if the incident simply is not reported." The organizations argued that since the *Red & Black* decision university officials in Georgia have found that "complaining parties do not wish to participate in a hearing...[and] those hearings which are held are shallow."

Unfortunately, the fact that serious cases are treated behind closed doors is what draws the suspicions of First Amendment advocates and critics of what the *New York Times* called "Offstage Justice" in a two-part major series on campus disciplinary systems in 1996. "At a time when crackdowns on crime and adult sentences for many juvenile offenders, campus justice is a kind of parallel judicial universe where offenses as serious as arson and rape can be disposed of discretely under the same student conduct codes that forbid sneaking into a university dance without a ticket" (Bernstein). Many of the First Amendment arguments put forth by the newspapers in the two Miami University cases hinge on the premise that if adjudication of incidents traditionally handled by the courts wind up in closed door hearings, criminal matters no longer become open to all who have a public interest in observing and reporting on the outcome.

Mark Goodman, executive director of the Student Press Law Center complained that the "end result" of the District Court decision in United States v. Miami University will be, "Schools that don't want to provide details about certain kinds of crime will make sure these criminal incidents are referred to campus disciplinary proceedings, because that way they can keep things under wraps" (*The Chronicle of Higher Education*, 2000).

The opinion that campuses "hide" certain cases in internal, judicial proceedings has become a "widespread belief," said the faculty advisor to *The Miami Student*. "I think it will be to the benefit of the university, the students, and the whole collegiate process to take away this notion—whether real or imagined—that things are being covered up at the university level when it comes to crime" (Campus Security Report, Feb. 1998).

That view is held in other quarters of the campus, beyond those who work with the student media. [vi] "In my role as a disciplinary council member, a justification I sometimes hear for imposing a tough penalty is that it will 'send a message' to other students. However, the sentences are not made public. It's up to the campus rumor mill to spread the word about potential consequences of bringing a gun on campus, hazing fraternity pledges, assaulting an administrator, etc. Making the proceedings and records public would be a much more efficient way to 'send a message'" (Hansen).

Conclusion

The two Miami University legal cases drew attention to the basic issues about the confidentiality of campus judiciary systems. However, the litigation has centered on the legal question of whether FERPA as it is written applies to disciplinary records. Left in the wake, however, are continuing questions about what is better for the public good: Open access or intrusion into private or internal proceedings. There are legitimate arguments that proponents of both positions can make. In an era of public concern about crime, when, rightly or wrongly, critics of colleges and universities are alleging that institutions are not paying significant attention to safety issues, more higher education officials may begin to realize that maintaining the confidentiality of a disciplinary system breeds growing mistrust of the system's effectiveness.

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Notes

[i] Congress in recent years amended FERPA in two other instances to allow release of disciplinary information.

[ii] The confusion over whether these are "crime records" is owed in part to the fact that police records may comprise part of the disciplinary files. An arrest record or other public police document might in fact be the catalyst for disciplinary violation. Strangely, though, as part of a student's disciplinary file that police record, while public in a courthouse, becomes a private document under FERPA.

[iii] This would have been the situation in Ohio had the state supreme court's decision in *The Miami Student v. Miami University* remained intact.

[iv] (Some institutions like Miami University review all arrests of students off campus, in the local community, to look for violations of the student conduct code. Some, like Ohio State University, selectively consider off-campus arrests as a trigger to initiate university discipline. Others deem off-campus arrests no business of the institution.)

[v] Campuses now also have an option of notifying parents of alcohol violations committed by their children, if the student is under the age of 21.

[vi] To debunk myths and erroneous information about its disciplinary processes, internal judiciary offices on some campuses have opened selective judicial hearings, but only after participants sign waivers of their FERPA rights.